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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DIVA LIMOUSINE, LTD., individually and
on behalf of all others similarly situated,

No. 3:18-cv-05546-EMC

21 || Plaintiff,

**NOTICE OF MOTION AND MOTION
FOR PARTIAL SUMMARY
JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

23 UBER TECHNOLOGIES, INC., et al.

Date: November 15, 2018
Time: 1:30 p.m.
Location: Courtroom 5
Judge: Hon. Edward M. Chen

NOTICE OF MOTION AND MOTION

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 15, 2018, at 1:30 p.m., in Courtroom 5 of this Court, located at 450 Golden Gate Avenue, 15th Floor, San Francisco, California, Plaintiff Diva Limousine, Ltd., will move the Court under Rule 56 of the Federal Rules of Civil Procedure for partial summary judgment in its favor and against all Defendants (collectively “Uber”).

This motion seeks partial summary judgment on a single issue: Whether Uber drivers are employees of Uber under California’s transportation industry wage order. This issue is appropriate for early, summary disposition. The California Supreme Court recently held that a transportation worker is an employee unless the hiring entity can show that the worker “performs work that is outside the usual course of the hiring entity’s business.” *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 925 (2018), reh’g denied (June 20, 2018). Uber cannot make that showing. “Uber does not simply sell software; it sells rides.” *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015). And Uber’s rides are provided by its drivers within the usual course of its business.

No discovery is needed to establish the necessary facts. And summary judgment on this issue will substantially streamline this case. Adjudicating partial summary judgment at this time is not only permitted by Rule 56(a); it is also efficient case management.

This motion is based on this notice of motion and motion, the memorandum of points and authorities below, the concurrently filed Declaration of Tom Kayes and appendix of evidence provided therewith and the Request for Judicial Notice, all pleadings and papers on file in this action, any matters of which the Court may or must take judicial notice, and such additional evidence or argument as may be presented at any hearing.

Dated: October 5, 2018

Respectfully submitted,

/s/ Tom Kayes

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Unlike Diva Limousine, Ltd., Uber misclassifies its drivers as independent contractors even though California law requires them to be classified as employees. California’s Unfair Competition Law prohibits these unlawful acts and practices. The first step in establishing this claim is therefore determining whether Uber’s drivers must be classified as employees. This Court can decide that issue and substantially streamline this case by answering one question: Is providing rides an integral part of Uber’s business? If the answer is yes, Uber drivers are Uber’s employees. Courts in this district and elsewhere have already answered this question in the affirmative. Because no genuine dispute of material fact exists, the court should grant partial summary judgment on the issue of misclassification.

The California Supreme Court recently simplified the analysis this issue requires. Workers a company uses to conduct its business are presumed to be employees. *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 955 (2018), *reh'g denied* (June 20, 2018) (“*Dynamex*”). To overcome this presumption and lawfully classify a worker as an independent contractor, a company must prove three things:

- (A) that the worker is free from the control and direction of the hirer;
 - (B) that the worker performs work that is outside the usual course of the hiring entity's business; and
 - (C) that the worker is customarily engaged in an independently established trade, occupation, or business.

Id. at 925. This motion seeks partial summary judgment based on the second of these factors – whether “the worker performs work that is outside the usual course of the hiring entity’s business.” *Id.* at 966. Work is outside the usual course of the hiring company’s business if it is “merely incidental to” and not “an integral part of” that business. *Id.* at 961 n.29. Uber drivers provide rides that are indisputably an integral part of, and not merely incidental to, Uber’s business. Those drivers are therefore Uber’s employees.

1

2 **II. UNDISPUTED FACTS**

3 **A. Uber was formed to sell rides.**

4 Uber began as a “simple idea” – “what if you could request a ride from your phone?” Ex. 1
5 at 2.¹ Uber’s founders thought of the company as a “Next Generation Car Service.” Ex. 2 at 5. The
6 company was originally called UberCab. *Id.* In its founders’ early marketing efforts to investors,
7 Uber was described as providing a “fast & efficient on-demand car service” that was meant to be
8 “faster & cheaper than a limo, but nicer & safer than a taxicab.” *Id.* at 8, 15; *see also* ex. 22 at 205
9 (making Ex. 2 public). Other early self-descriptions emphasized that Uber was in the business of
10 selling rides. Ex. 2 at 27 (referring to UberCab as “the ubiquitous ‘premium’ cab service,” “The
11 One-click cab,” and “Cabs2.0.”). The concept was pitched to investors by touting the size of the
12 “Overall Market” for “Taxi and Limousine Services” as the market UberCab might conquer. *Id.* at
13 21-22. UberCab provided its first ride on July 5, 2010, in San Francisco. Ex. 4 at 34. A few months
14 later, UberCab dropped the “Cab” to become Uber. Ex. 5 at 37.

15 **B. Uber’s core business is still selling rides.**

16 Uber has always been in the business of selling rides under the Uber brand. “Uber” is the
17 dba of Uber Technologies, Inc. Ex. 6 at 40. Uber markets itself as providing a transportation service.
18 It has billed itself as an “On-Demand Car Service,” *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d
19 1137, 1141 (N.D. Cal. 2015), and it refers to itself as “Everyone’s Private Driver,” *Id.*; *see also* exs.
20 7 at 46; ex. 8 at 52. Today, Uber describes itself as “the largest global ridesharing network,” ex. 9
21 at 65, and claims as its “simple mission” making “transportation as reliable as running water
22 everywhere, for everyone,” ex. 10 at 72. Part of that mission is “UberEverywhere,” which is the
23 “bold idea that no matter where you are, a reliable ride with Uber is just 5 minutes away.” *Id.*
24 Internal Uber documents proclaim that “Uber provides the best transportation service” and that

25 _____
26 ¹The citations are to the exhibits attached to the concurrently filed declaration of Tom
27 Kayes. The page numbers referred to in the citations are those that have been applied in red to the
28 lower, right-hand corner of the exhibits. These numbers have the prefix “Pls.’ PSJM.” Moreover,
for the reasons stated in the concurrently filed request for judicial notice, Diva requests that the
Court take judicial notice of all facts and matters properly noticed in and from exhibits 6, 7, 8, 11,
17, 18, 19, 20, 22, 23, 28, 29, 30, 32, 33, 37, 38, and 39.

1 Uber “will be taking some major steps to improve both driver and vehicle quality on the Uber
2 system.” Ex. 11 at 78; *O’Connor*, 82 F. Supp. 3d at 1142-44.

3 Since its first ride, Uber has grown dramatically. Uber measures its growth by the number
4 of rides it has sold. Uber hit 1 billion rides in less than six years. Ex. 12 at 82. Just six months after
5 that, Uber sold ride number 2 billion. Ex. 13 at 85. Ride number 5 billion was in May 2017. Ex. 14
6 at 88. And Uber passed the 10-billion-ride mark just a few months ago, on July 24, 2018. Ex. 15 at
7 91. Passengers can now get an Uber in more than 600 cities throughout the world. Ex. 16 at 104.

8 When selling a ride, Uber sets the terms and collects the money. Uber determines what to
9 charge for each ride using Uber’s own pricing formula. Ex. 17 at 106; Ex. 21 at 193; *O’Connor*, 82
10 F. Supp. 3d at 1136 (“Uber sets the fares it charges riders unilaterally”). Uber’s revenue comes
11 from selling rides. Ex. 18 at 143, 147; Ex. 19 at 155; *O’Connor*, 82 F. Supp. 3d at 1142 (“Uber’s
12 revenues do not depend on the distribution of its software, but on the generation of rides by its
13 drivers.”). Uber collects the full fare from the customer and remits a percentage to the driver. Ex.
14 20 at 171-73; Ex. 21 at 193-94; *O’Connor*, 82 F. Supp. 3d at 1136 (“Because Uber receives the
15 rider’s payment of the entire fare, the relevant contracts provide that Uber will automatically deduct
16 its own ‘fee per ride’ from the fare before it remits the remainder to the driver.”).

17 As Uber has grown, it has diversified the types of rides it sells. UberCab began as a black
18 car service. Exs. 2 at 17. Uber has since grown to include regular cars, large cars, luxury cars,
19 SUVs, and vans, under product names like UberX, UberBLACK, UberXL, UberSUV, and
20 UberSELECT—all available through the Uber App. Exs. 14 at 88, 23 at 215-16. Now Uber is
21 working on self-driving cars. Ex. 24 at 320. As Uber has expanded, it has branched out into other
22 sectors of the transportation industry. It has launched Uber Freight, “an easy-to-use tool that
23 connects trucking companies and their drivers directly with shippers.” Ex. 25 at 325. It also has
24 Uber for Business, which acts like “a digital ‘headquarters’ for all your company’s ground
25 transportation.” Ex. 26 at 328. Uber even has a medical transportation business in its portfolio. Ex.
26 27 at 330. Thus, Uber’s existing and future business plans fall squarely within the transportation
27 industry.

28 Uber even operates under a number of transportation company permits. Uber holds a

1 California Transportation Charter Party (“TCP”) permit, ex. 28 at 342, which is for an entity
2 “engaged in the transportation of persons by motor vehicle for compensation, over any public
3 highway in [California],” Cal. Pub. Util. Code § 5360. Uber’s subsidiary, UATC, also holds a TCP
4 permit. Ex. 29 at 344. Another wholly-owned subsidiary, Rasier-CA, holds a “Transportation
5 Network Company” (or “TNC”) permit, which is a Class P sub-type of a TCP permit. Ex. 30 at
6 346. That permit authorizes Uber to “transport[] passengers by motor vehicle over the public
7 highways of the State of California” using “an online enabled application or platform.” *Id.* Uber
8 drivers operating under the TNC permit must display Uber’s “trade dress,” which are the distinctive
9 “Uber” decals on the front and rear of the vehicles. Ex. 31 at 349-51. Uber also has a pending TNC
10 permit application for the Uber parent entity, Uber Technologies, Inc. Ex. 28 at 342. After a lengthy
11 and detailed administrative proceeding, the CPUC determined that Uber is both a TCP and a TNC.
12 Ex. 33 at 465.²

13 **C. Uber drivers are integral to Uber selling rides.**

14 Uber has always depended and continues to depend on its drivers to provide the rides that
15 Uber sells. Exs. 20, 21, 34 at 504. Uber’s success, indeed its entire business, would not have been
16 possible without Uber’s drivers – a fact readily acknowledged by Uber’s leadership. In a letter to
17 drivers, Uber’s heads of U.S. operations and of driver experience acknowledged: “simply put, Uber
18 wouldn’t exist without you.” *Id.* Other Uber personnel have expressed similar sentiments about the
19 centrality of drivers to Uber’s business, saying “Uber wouldn’t be what it is without drivers and
20 couriers – they are at the heart of the Uber experience,” ex. 35 at 509, and “Drivers are the heart of
21 our service,” ex. 36 at 516. Because drivers are at the heart of the Uber experience, Uber, as part of
22 offering “the best transportation service,” works hard to ensure that drivers provide riders with a
23 consistently positive experience. Exs. 37 at 526-31; *O’Connor*, 82 F. Supp. 3d at 1142.

24 These sentiments reflect the same reality that this Court recognized in *O’Connor*: “Uber

25
26 ²Further, in that proceeding, Uber submitted statements regarding Uber’s corporate
27 organization, admitting that Rasier-CA, Rasier, and Uber USA are all wholly-owned subsidiaries
28 and that the ultimate parent is Uber Technologies, Inc. *See, e.g.*, ex. 33 at 212-28. The CPUC
determined that UATC is also a subsidiary of another company, with Uber Technologies, Inc. as
the ultimate parent. *See* ex. 33 at 547, n. 22. The CPUC found that Rasier-CA had no employees.
Id. at 470. The same was true for Uber USA. *Id.* at 474.

1 does not simply sell software; it sells rides.” 82 F. Supp. 3d at 1141. The conclusion that Uber sells
2 rides is inescapable. Uber’s revenue is not from selling software to riders. Kayes Dec. ¶ 4. Uber’s
3 revenue is not from selling software to drivers. *Id.*; ex. 32 at 361. Uber gives its app away for free.
4 “Uber’s revenues do not depend on the distribution of its software, but on the generation of rides
5 by its drivers.” *O’Connor*, 82 F. Supp. 3d at 1142; Exs. 18 at 143, 147. And—at least until cars
6 drive themselves—every ride needs a driver. Despite Uber’s reliance on these drivers to provide
7 the rides that are its core business, Uber classifies these drivers as independent contractors, not
8 employees, and compensates them as such. Ex. 23 at 291.

9 These facts demonstrate that Uber drivers perform work that is within the usual course of
10 Uber’s business. Accordingly, Diva seeks partial summary judgment holding Uber’s drivers are
11 employees under applicable California law.

12 III. ARGUMENT

13 A. Legal Standards

14 1. Partial summary judgment

15 A party may seek summary judgment at any time on any part of a claim. Fed. R. Civ. P.
16 56(a). Partial summary judgment motions are subject to the same standards as motions for summary
17 judgment targeting entire claims or defenses. *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021
18 (9th Cir. 2001). The Court “shall grant summary judgment if the movant shows that there is no
19 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
20 Fed. R. Civ. P. 56(a). A factual dispute is material only if it “might affect the outcome of the suit
21 under governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a factual
22 dispute is genuine only if “the evidence is such that a reasonable jury could return a verdict for the
23 nonmoving party” based upon it. *Id.* To determine whether a factual dispute is genuine, the court
24 must view the evidence in the light most favorable to the non-moving party and draw all reasonable
25 inferences in that party’s favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

26 2. Classification of drivers under California employment law

27 California labor law secures for employees the right to a minimum wage, overtime, and
28 other benefits. E.g., Cal. Labor Code §§ 1171-1194. Many of these rights are further defined by

1 “wage orders” issued by California’s Industrial Welfare Commission. *Id.* § 1182.11. These wage
2 orders have the force of law and are “final and conclusive for all purposes.” *Id.* There is a general
3 minimum wage order, Cal. Code Reg. § 11000, and there are wage orders specific to particular
4 industries, *id.* §§ 11010-11170. Transportation workers are covered by Wage Order 9. Cal. Code
5 Reg. § 11090. With certain irrelevant exceptions, Wage Order 9 “appl[ies] to all persons employed
6 in the transportation industry whether paid on a time, piece rate, commission, or other basis.” *Id.* §
7 11090(1). The order defines “employ” as “to engage, suffer, or permit to work.” *Id.* §§
8 11090(2)(D)-(E).

9 This suffer-or-permit language defining employment under the wage order has “striking
10 breadth.” *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 925 (2018), reh’g denied (June
11 20, 2018) (“*Dynamex*”). It “presumptively considers all workers to be employees and permits
12 workers to be classified as independent contractors only if the hiring business demonstrates that the
13 worker in question satisfies each of three conditions.” *Id.* at 955.

14 Those three conditions are:

- 15 (a) that the worker is free from the control and direction of the hirer in connection with
16 the performance of the work, both under the contract for the performance of the
17 work and in fact; and
- 18 (b) that the worker performs work that is outside the usual course of the hiring entity’s
19 business; and
- 20 (c) that the worker is customarily engaged in an independently established trade,
21 occupation, or business of the same nature as that involved in the work performed.

22 *Id.* at 955-56. The test is commonly referred to as the ABC test. “[E]ach part of the ABC test may
23 be independently determinative of the employee or independent contractor question” *Id.* at 966.
24 If an employer fails to satisfy a single part of the test, then the workers in question are its employees.
25 *Id.*

26 This motion turns on part B. A “hiring entity must establish that the worker performs work
27 that is outside the usual course of its business in order to satisfy part B of the ABC test.” *Id.* at 961.
28 Work that is “an integral part” of the hiring company’s business is within the usual course; work

1 that is “merely incidental to” the hiring company’s business is not. *Id.* at 961 n.29. In other words,
2 a worker is an employee unless the hiring business proves that the work performed is merely
3 incidental to its business.

4 The California Supreme Court in *Dynamex* offered several examples to illustrate the
5 application of part B of the ABC test. On the independent contractor side of the line is a retail store
6 hiring a plumber to repair a bathroom leak or an electrician to install a new electrical line. *Id.* at
7 959-60. On the other side, the employee side, are work-at-home seamstresses hired by a clothing
8 manufacturer to make the dresses the manufacturer sells and a bakery hiring cake decorators to
9 work on a regular basis on custom cakes. *Id.* These examples demonstrate that businesses cannot
10 satisfy part B if they classify as independent contractors the workers performing the work that lies
11 at the heart of their operations.

12 Uber’s long-time employment counsel, Littler Mendelson P.C., agrees: “As a practical
13 matter, for most companies, this narrow B prong works as a ‘de facto ban,’ and prevents the use of
14 independent contractors except where the person’s work has no tangible connection to the hiring
15 entity’s business.” Stephen T. Melnick, Shareholder, *California Announces a New Wage and Hour*
16 *Independent Contractor Test* (May 1, 2018), available at <https://www.littler.com/publication-press/publication/california-announces-new-wage-and-hour-independent-contractor-test>.

18 **B. The Court should grant partial summary judgment holding that Uber’s drivers
19 are its employees.**

20 Summary judgment is appropriate here. Wage Order 9 applies to Uber’s drivers. And,
21 according to the Wage Order, the drivers are Uber’s employees unless Uber can prove that the
22 drivers’ work is merely incidental to Uber’s business. That is not going to happen. Uber sells rides
23 and each ride needs a driver. Uber itself agrees, admitting that the company “wouldn’t exist”
24 without its drivers. Ex. 34 at 504. The drivers who provide rides for Uber must therefore be
25 classified as employees.

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27
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1 **1. California Wage Order 9 applies to Uber's drivers.**

2 Wage Order 9 “appl[ies] to all persons employed in the transportation industry whether paid
3 on a time, piece rate, commission, or other basis” Cal. Code Reg. § 11090(1). And
4 “‘Transportation Industry’ means any industry, business, or establishment operated for the purpose
5 of conveying persons or property from one place to another whether by rail, highway, air, or water
6 [], and all operations and services in connection therewith.” *Id.* § 11090(2)(N).

7 Uber drivers self-evidently operate “in the transportation industry.” There could be no more
8 quintessential participant in the transportation industry than a driver. The driver of a for-hire vehicle
9 is primarily responsible for “conveying persons or property from one place to another . . . by . . .
10 highway.” Thus, Uber drivers are covered by Wage Order 9.

11 **2. Under Wage Order 9, drivers must be classified as employees unless
12 Uber can prove that their work is merely incidental to Uber's business.**

13 Wage Order 9 defines “employ” as “to engage, suffer, or permit to work.” *Id.* §§
14 11090(2)(D)-(E). As noted, the California Supreme Court recently interpreted this language,
15 holding that it turns on application of the ABC test. *Dynamex*, 4 Cal. 5th at 925. Under part B of
16 that test, a worker is an employee unless the hiring business proves “that the worker performs work
17 that is outside the usual course of the hiring entity’s business.” *Id.* at 955-56. Work that is “an
18 integral part” of the hiring company’s business is within the usual course; work that is “merely
19 incidental to” the hiring company’s business is not. *Id.* at 961 n.29. In other words, a worker is an
20 employee unless the hiring business proves that the work performed is merely incidental to its
21 business.

22 Part B addresses a fundamental concern regarding the evasion of employment protections.
23 Businesses face a temptation to reduce labor costs by exploiting vulnerable workers; yet those
24 workers, in turn, are most in need of the Act’s protection. In the past, some businesses have given
25 in to this temptation by engaging in subterfuge, such as by retaining the same unskilled workers
26 they would normally hire to produce their core product or service, but compensating these workers
27 on a piece-rate system to avoid having to pay overtime or minimum wages.

28 Courts have uniformly rejected these efforts to sidestep wage protections. *E.g., Goldberg v.*

1 *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 28-30 (1961) (holding that home workers were
2 employees rather than members of a supposed “cooperative” because “[a]part from formal
3 differences, they are engaged in the same work they would be doing whatever the outlet for their
4 products”); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729-31 (1947) (holding that “meat
5 boners” were employees of a slaughterhouse despite a contract that purported to hire them as
6 independent contractors, noting “[w]here the work done, in its essence, follows the usual path of
7 an employee, putting on an ‘independent contractor’ label does not take the worker from the
8 protection of the Act”); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F. 2d 748, 755 (9th Cir.
9 1979) (rejecting argument that migrant strawberry pickers paid on a piece work basis were
10 independent contractors, noting that the workers’ “appear to be an integral part of [the defendant’s]
11 strawberry growing operation”); *S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal. 3d
12 341, 355 (1989) (holding that migrant workers compensated on piece work basis were employees
13 because “[a] business entity may not avoid its statutory obligations by carving up its production
14 process into minute steps, then asserting that it lacks ‘control’ over the exact means by which one
15 such step is performed by the responsible workers”).

16 The California Supreme Court in *Dynamex* recognized a similar concern:

17 If the wage order’s obligations could be avoided for workers who provide services
18 in a role comparable to employees but who are willing to forgo the wage order’s
19 protections, other workers who provide similar services and are intended to be
protected under the suffer or permit to work standard would frequently find
themselves displaced by those willing to decline such coverage.

20 *Id.* Accordingly, the *Dynamex* Court reasoned, “[t]reating all workers whose services are provided
21 within the usual course of the hiring entity’s business as employees” is critical to the welfare of
22 those workers who need the wage orders’ protections. *Id.* at 960.

23 **3. Uber cannot prove that drivers’ work is merely incidental to its
24 business.**

25 There is no need to empanel a jury to see if Uber can prove that driving is outside the usual
26 course of its business. Uber was founded as a “fast & efficient on-demand car service.” Ex. 2 at 8.
27 Uber’s first pitch to investors focused on the size of the market for rides. Ex. 2 at 21-23. Uber has
28 referred to itself as a “Next Generation Car Service” and as a “premium cab service.” Ex. 2 at 5;

1 Ex. 2 at 27. And it marks its business milestones in rides sold—1 billion, 2 billion, 5 billion, 10
2 billion. Exs. 12-15. Uber now touts itself as the “largest global ridesharing network.” Ex. 9 at 65.
3 And Uber readily admits the obvious: Uber could not operate its business without its drivers. Ex.
4 34 at 504. They are, in Uber’s own words, the “heart” of Uber’s “service” and “experience.” Exs.
5 35 at 509, 36 at 516. Uber admits that it “wouldn’t exist without” them. Ex. 34 at 504.

6 Uber also holds multiple licenses as a transportation company. Uber is licensed as a TCP
7 charter-party carrier, ex. 28 at 342, which is defined to mean an entity “engaged in the transportation
8 of persons by motor vehicle for compensation, over any public highway in [California],” Cal. Pub.
9 Util. Code § 5360. And Uber is likewise licensed (via a wholly-owned subsidiary) as a TNC carrier,
10 ex. 30 at 346, which “transports passengers by motor vehicle over the public highways of the State
11 of California” using “an online-enabled application or platform.”

12 These indisputable facts demonstrate that providing rides is within the usual course of
13 Uber’s business. No reasonable jury could believe that workers who are essential to a company’s
14 survival, who are the heart of its businesses, and who perform the service for which it is licensed
15 are—in spite of all that—merely incidental to that business.

16 Prior summary judgment decisions in suits against Uber support this conclusion. This Court
17 found that “Uber simply would not be a viable business entity without its drivers.” *O’Connor*, 82
18 F. Supp. 3d at 1141. Even courts that have found Uber drivers to be outside the Fair Labor Standard
19 Act’s definition of “employee,” have nonetheless recognized that they are integral to Uber’s
20 business. For instance, one federal district court recently found that “Uber drivers are an essential
21 part of Uber’s business as a transportation company,” and said that “it seems beyond dispute that
22 if Uber could not find drivers, Uber would not be able to function.” *Razak v. Uber Techs., Inc.*,
23 2018 WL 1744467, at *19 (E.D. Pa. Apr. 11, 2018).

24 Courts have also granted summary judgment under part B of the ABC test in materially
25 identical cases. *Granite State Ins. Co. v. Truck Courier, Inc.* is just one example. 2014 WL 316670
26 (Mass. Super. Jan. 17, 2014). There, a courier company was sued by its worker’s compensation
27 carrier for premiums owed. (The company had not paid premiums for its drivers because it
28 considered them independent contractors; the insurer thought they were employees and demanded

1 premiums.) The courier company, which offered “same-day pick-up and delivery services,” argued
2 that the drivers who did the pick-ups and deliveries were not employees but independent contractors
3 because they owned their own cars. *Id.* at *1. The court granted plaintiff’s motion for summary
4 judgment under part B of the ABC test, holding that the courier company “specializes in same day
5 pick-up and delivery services, which [are] entirely dependent on having vehicles and drivers. [The
6 company] cannot seriously dispute that the drivers’ services were necessary to its business model
7 and were a regular and continuing part of its business.” *Id.* at *4. The case was simple: “The
8 undisputed facts are clear that without the drivers, [the company] would not have a business.
9 Because [the company] cannot prove all three elements [of the ABC test], the drivers must be
10 considered employees as a matter of law.” *Id.* The same is true here. Uber admits it would not
11 “exist” without its drivers. ex. 34 at 504, so they are its employees as a matter of law. *See also*
12 *Martins v. 3PD*, 2013 WL 1320454, at *14 (D. Mass. Mar. 28, 2013) (granting driver-plaintiffs’
13 motion for summary judgment against last-mile delivery company, because drivers were “engaged
14 in the exact business the employer was,” and were essential to that business)).

15 These decisions correctly hold that essential workers cannot be “merely incidental” to the
16 business they work for. This same principle requires summary judgment here under part B.

17 **4. Uber cannot defeat summary judgment by calling itself a “broker” or a
18 “technology company”—labels courts have roundly rejected.**

19 Uber frequently argues in misclassification litigation that it is merely a “‘broker’ of
20 transportation services,” e.g., *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 786 (N.D. Cal. 2016),
21 or sometimes that it is a “technology company” rather than a transportation company, e.g.,
22 *Crawford v. Uber Techs., Inc.*, 2018 WL 1116725, at *3–4 (N.D. Cal. Mar. 1, 2018). Uber may
23 offer the same argument here—that driving is outside the usual course of its business because it is
24 just a broker or just a tech company. This argument is both factually incorrect and legally irrelevant.

25 First, Uber’s self-serving label cannot be reconciled with the undisputed facts. As the Court
26 explained in *O’Connor*, “Uber’s self-definition as a mere ‘technology company’ focuses
27 exclusively on the mechanics of its platform (i.e., the use of internet enabled smartphones and
28 software applications) rather than on the substance of what Uber actually does (i.e., enable

1 customers to book and receive rides).” 82 F. Supp. 3d at 1141–42. This “unduly narrow frame”
2 focuses on “one instrumentality” used by Uber but ignores the nature of Uber’s overall business.
3 *Id.* “Uber does not simply sell software; it sells rides.” *Id.*

4 Other courts have reached the same conclusion. *See Razak*, 2018 WL 1744467, at *19; *Doe*
5 v. *Uber Techs., Inc.*, 184 F. Supp. 3d 774, 786 (N.D. Cal. 2016) (“In their briefs and at the hearing,
6 Uber has argued that it is not a common carrier but that it is a ‘broker’ of transportation services.
7 The Court is not persuaded by this argument.”); *Reardon v. Uber Techs., Inc.*, 115 F. Supp. 3d
8 1090, 1095–96 (N.D. Cal. 2015) (agreeing with the reasoning of *O’Connor* that “Uber is not a
9 technology company that primarily sells software; rather, Uber sells transportation services”).
10 Similarly, the CPUC has issued an administrative decision concluding that Uber is a transportation
11 company—a TCP charter-party carrier—as a matter of California law. Ex. 33 at 465.³

12 Second, Uber’s self-serving label misapprehends the nature of the governing standard under
13 part B. Under that standard, a hiring business cannot lawfully alter the classification of the workers
14 who perform its core service just by calling itself a broker of that service. *See, e.g., Awuah v.*
15 *Coverall N. Am., Inc.*, 707 F. Supp. 2d 80, 84 (D. Mass. 2010) (cited with approval in *Dynamex*, 4
16 Cal. 5th at 959). For example, in *Awuah*, a company called Coverall claimed to sell “janitorial
17 cleaning business” franchises. 707 F. Supp. 2d at 81. The reality was different. Businesses that
18 wanted cleaning service would call Coverall, pay Coverall, and Coverall would collect a portion of
19 the fee and have a “franchisee” do the actual cleaning. *Id.* at 82. The franchisees sued Coverall,
20 alleging misclassification, and moved for summary judgment under part B. Coverall argued that it
21 was not a cleaning service because “it sells franchises and trains and supports the franchisees, but
22 it does not clean any establishments, nor does it employ anyone who cleans.” *Id.* at 82-83. The
23 district court rejected Coverall’s argument, holding that “Coverall sells cleaning services, the same
24 services provided by these plaintiffs,” and granted the plaintiffs’ motion. “Because Coverall failed
25 to establish the second prong of [the ABC Test] the Court [held] that the Massachusetts franchisees
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³Uber is appealing this decision. But, while the appeal is pending, Uber must abide by its
28 prior settlement agreement with the CPUC in which it agreed to exert control over how drivers
provide the rides that Uber sells. Ex. 38.

1 were misclassified as independent contractors,” and granted the franchisees’ motion. *Id.* at 85.
2 Many other cases have rejected defendants’ attempts to avoid wage protections with a broker
3 argument. *E.g., McPherson Timberlands v. Unemployment Ins. Comm’n*, 714 A.2d 818, 821 n.29
4 (Me. 1998) (granting summary judgment to plaintiffs, rejecting argument that workers who
5 harvested timber for defendant that bought trees and sold cut timber were merely incidental to its
6 business); *Martins*, 2013 WL 1320454 at *14 (granting summary judgment under part B, and
7 rejecting defendant delivery company’s argument that it was merely a “property brokering and
8 freight forwarding business” rather than a delivery and transport company).

9 Indeed, many cases in which a defendant fails to satisfy part B of the ABC test, the
10 defendant has argued that it is merely facilitating the work of the plaintiff/employee rather than
11 acting as an employer. The very purpose of part B is to foreclose those resorts to form over
12 substance. *Dynamex* “bring[s] within the ‘employee’ category all individuals who can reasonably
13 be viewed as working in the hiring entity’s business, that is, all individuals who are reasonably
14 viewed as providing services to that business in a role comparable to that of an employee, rather
15 than in a role comparable to that of a traditional independent contractor.” 4 Cal. 5th at 959.

16 The application of these principles to Uber is clear. Uber is in the transportation business.
17 It says so itself: “Uber’s mission is to bring transportation—for everyone, everywhere.” Ex. 10. It
18 applied for and received multiple licenses from California as a transportation company. The drivers
19 that do the transporting are undeniably working in the usual course of Uber’s business. They are
20 therefore Uber’s employees under Wage Order 9.

21 **V. CONCLUSION**

22 For all the foregoing reasons, no genuine issue of material fact remains to be decided.
23 Providing rides is integral to Uber’s business and Uber drivers’ work is within the usual course of
24 Uber’s business. Therefore, under Wage Order 9 and part B the ABC test adopted by the California
25 Supreme Court in *Dynamex*, the Court should grant partial summary judgment finding that Uber’s
26
27
28

1 drivers are employees and not independent contractors

2 Dated: October 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 5, 2018, I served this document on all ECF-registered counsel via the Court's CM/ECF system.

/s/ Tom Kayes
Tom Kayes